



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 40 OF 2014

JOYCE NJUGUNA.....APPELLANT

VERSUS

P.N MASHRU LTD.....RESPONDENT

(Being an appeal arising from the judgment and decree of the Senior Principal Magistrate Honorable S.M Mokuia delivered and dated on 20/03/2014)

JUDGMENT

1. The appellant (**JOYCE NJUGUNA**) had filed a suit where she sought both general and special damages against the respondent for the injuries she sustained while travelling in motor-vehicle registration **No. KBL 277D** when motor-vehicle registration **No. KBL 758/ZD3348** owned by the respondent, lost control and hit the vehicle she was traveling in.

2. The parties recorded a consent on liability on the 16.1.2014 in the ratio of **85:15%** in favor of the appellant as against the respondent in the following terms:

General Damages	Kshs. 2, 200,000
Less 15% contribution.	Kshs. 330, 000
Sub-total	Kshs 1,870,000
Add special damages	Kshs. 416,000
Total	Kshs. 2,286,000

The appeal is limited to the assessment of quantum only.

3. The appellant had testified that on impact she lost consciousness, and fractured her back as well as her left leg. She also suffered injuries to her chest and bruises all over her body. She was treated both locally and in India. The medical documents tendered at the trial indicated her injuries as:

- a) Multiple bruises and cut wounds**
- b) Fracture of the left clavicle**
- c) Fracture of the spine at L5 and L6**
- d) Fracture of the left femur**
- e) Inability to move the lower limbs with complete spinal transaction leading to paraplegia**
- f) She had also lost a lot of blood causing her to become anaemic**

On account of these injuries she suffered total paralysis to her lower limbs, and the prognosis confirmed that she would never walk again, leading to her being confined to a wheel-chair. She is unable to respond to, and answer to calls of nature on her own and has to use adult

diapers for sanitation, and a catheter to drain the urine. Her condition has forced her to engage **Anne (PW2)** who assists her at a salary of Kshs 7,000/- per month

4. She further testified that she had a clothes retail shop and earned Ksh 70,000/= per month but as a result of the injuries, she had to close the business, saying she did not have an employee in the shop nor did she keep any record but she used to pay tax, although she did not have any tax return records. She had urged the court to pay her loss of earning capacity, as she now only relied on income from her rental houses to provide for herself and her children single-handedly as she had divorced from her husband. On cross-examination she testified that she had to close her business after the accident.

5. The trial court in its judgment took into account past decisions and relied on the case of **ALEXANDER KIPKOECH KOSGEY V FREDRICK TOWEET AND OTHERS (NKU HCCC NO. 267 OF 1995 and LILLIAN GAKETHI MWONIA V STANLEY MWITHUMBU MITHIRI (MERU HCCC NO.84 OF 2007)** where for almost similar injuries plus the residual effects, the courts awarded general damages of Kshs. 2,000,000/-. This is what informed the decision for the general damages awarded herein

6. On loss of earning capacity, the trial court declined to give any damages saying this ought to have been considered as part of the general damages, and that the same was not properly pleaded

7. The appellant contested the findings on grounds that:

1) The trial magistrate erred in arriving at a conclusion based on unfair and unequal treatment of the evidence adduced at the hearing.

2) The trial court failed to consider and give sufficient weight to the appellant's pleadings and evidence adduced at the hearing.

3) The trial court misapprehended the evidence tendered by the appellant.

4) The trial Magistrate erred in law and in fact by relying on the wrong principles of law in reaching his conclusion.

5) The trial magistrate by failing to award the appellant damages for loss of earning capacity despite the sufficient evidence tendered.

6) The by failing to award the Appellant costs of future treatment, hiring and maintenance of a house-help and the cost of maintenance of the wheel chair.

7) The learned Magistrate erred in law and in fact in failing to consider the submissions of the appellant and the authorities cited.

8) The learned magistrate erred in law and in fact by failing to take into account and /or consider an award for loss of earning capacity in determining the general damages to be awarded to the appellant.

8. The appellant's counsel urged the court to find that the injuries deserved a higher quantum of damages than what was awarded.

9. The appellant had pleaded that as a result of the injuries sustained, she has entirely lost her earning capacity taking into account she was a business woman selling clothes and earning a minimum of **Ksh 50,000/= per month**. Further that on account of the injuries and the incapacity sustained she is unable to engage in gainful employment and/or at all provide for her family and her general livelihood.

10. Parties had been ordered to file submissions on the appeal but only the appellant filed her submissions where her counsel argued that the sum awarded for general damages was inordinately low taking into account the nature of the injuries, the prognosis and the residual effects. The court was referred to **H. West & Sons Ltd v. Shephard** (1964) A C 32.6 at 345 where the court stated as follows:

"...money cannot review a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process, there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable award..."

He also referred to **Joseph Maganga Kasha v. KPLC LTD (2012) eKLR** where the plaintiff had sustained serious injuries and was paralysed from his waist downwards, he was given an award of Ksh 3,000,000/=. In **Nancy Oseko v. B.O.G Moi Girls High School (2011) eKLR** an award of **Ksh 2,500,000/=** was awarded for chest injury with accumulation of blood in the chest, head compression, fracture of the thoracic spine no.12, loss of sensation from the level T-12 downwards, loss of function downwards and loss of control of urine and stool.

11. On the issue for loss of earning capacity, the appellant urged that the trial court erred when it stated that loss of earning capacity ought not only to be pleaded but be specifically proved, saying this is a general damage claim and not a special claim as required by law and there is no formula in assessing the same. This court was referred to the Court Appeal decision in **Mumias Sugar Company Limited v. Francis Wanalo(2007) eKLR** where it was held that:

"Loss if earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token, modest or substantial depending on the circumstances of each case."

12. In the case of *Mwangi & Anor v. Mwangi* (1996) eKLR 285(CAK) the Court of Appeal pointed out the difference between loss of earnings and loss of earning capacity, pointing out that an award under loss of earning capacity is employed to compensate for the risk that the disability has exposed the claimant to either losing the job in future, or in case one loses the job, the diminution of chances of getting an alternative job in the labour market. Where the claimant is not in employment then it means that the risk that the claimant will not get suitable earnings in future. Loss of earning capacity is thus that which prevents or limits one from ever regaining full use of the body organs, and/permanently impedes one's ability to effectively function or exist as a human being. The appellant had stated that she was in business and was a sole provider of her family of 3 children. Since she had been confined to a wheelchair. Her business earned her Ksh 70,000/= but it had collapsed as she could not engage in her duties. The accident had permanently affected her capacity to earn a living. She could not produce receipts being an informal sector this was never rebutted by the respondent. The trial court erred in failing to consider that to prove her claim in loss of earning capacity she did not have to give documentary evidence. In *Jacob Ayiga Maruja & Anor v. Simeon Obayo* (2005) eKLR the court of Appeal held that documentary evidence is not necessary to prove loss of earning capacity and also the court was referred *George Rogoka v. Attorney General*, Nairobi High Court Civil Case No. 3753 of 1996.

13. This court was urged to adopt a minimum wage of Ksh 7000/=. The retirement age is 60 years thus a multiplier of 19 years would be reasonable. She computed the same as follows: $7000 \times 19 \times 12 = \text{Ksh } 1,596,000$ as earnings for loss of earning capacity.

14. The appellant argued that she had been confined to a wheelchair and thus required a house-help. She also submitted that she required future medical treatment. She engaged a physiotherapist whom she paid Ksh 1,000/=. PW2 evidence was never challenged by the respondent since her evidence corroborated the claim on future medication which she had specifically pleaded and specially proved. In *Kenya Bus Services Ltd v. Gituma* (2004) eKLR the court stated that the claim for future medical care is a special claim which one has to pleaded.

15. Further the appellant required a house help for her entire life. The house help PW2 testified that she was being paid ksh 7,000/=. Therefore the amount awardable is $\text{Ksh } 10,000 \times 10 \times 12 = \text{Ksh } 1,200,000/=$ since the current wages for house helps is Ksh 10,000/=

16. Finally they urged the court to award the appellant as follows.

a) General damages for pain, suffering and loss of amenities ksh 3,000,000/=

b) Loss of earning capacity Ksh 1,596,000/=

c) Cost of maintaining a household and future treatment

Ksh 1,200,000/=

d) Less 15% contributory negligence (Ksh 869,400)

Ksh 4,926,600/=

e) Add special damages ksh 416,000/=

Ksh 5,342,600/=

f) Less decretal amount paid to the appellant Ksh 2,286,000/

Ksh 3,056,600/=

Analysis and determination

The issues for determination are:

- i. Whether the trial court erred in determining the amount to award the appellant
- ii. Whether the trial court erred in failing to award a damages for loss of earning capacity, and costs for future treatment.
- iii. What quantum ought to be awarded.

17. This is a court of first appeal and the court is duty bound as well established in *Selle v. Associated Motor Boat Co.* (1968) EA 123 as follows:

“An appeal to this court from a trial by the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistency with the evidence in the case generally.”

18. The comparable awards which the trial court relied on were a useful guide, but coming several years after, I think it was imperative to

take into consideration the economic trends the country has been through in quick succession, and the diminishing value of the Kenyan shilling. In my view damages of Kshs. 2,500,000/- is a more reasonable figure. This is the subjected to the agreed percentage of 15% contribution 2.125.000 to give a sum of Kshs.

19. The issue in dispute is that the court failed to award the loss of earning capacity despite the fact that the appellant had pleaded in her amended plaint at paragraph 6A and had given evidence in court. Loss of earning capacity is described in **Butler v. Butler** (1984) KLR 225 as follows:

“A person’s loss of capacity occurs when as a result of an injury, his chances in the future of any work in the labour market or work, as well as paid before the accident are lessened by his injury.”

20. The court finds that as testified by the appellant she was in business of selling clothes. Although she did not avail receipts in prove of the same, she earned some money from her business which was affected by her confinement on the wheelchair. She had infact pleaded the same. She had testified that she earned Ksh 70,000. She did not provide documents to support claims of running a shop...surely she would at least have a business licence, and some receipts for stocks purchase, yet this court is guided by the sentiments expressed in the Mumias Sugar Company Ltd case that loss of earning can be claimed as a part of general damages for pain and suffering and loss of amenities, or as a separate head of damages. The appellant had pleaded this as a separate head of damages.

21. I take the view that this is a general damages claim, guided by the Court of Appeal decision in **Mumias Sugar Company Limited v. Francis Wanalo** (Supra) where the court held that this claim is a general damage, and it is to compensate the claimant for the risk of the disability exposed to after the accident, and in this case it is for the risk of getting a job or any suitable earning at the date of the injury. The appellant’s claim is adequately proved by the medical reports which demonstrate the limitation the injuries have placed on her, rendering her totally dependant and unable to perform even the most basic task let alone try to earn a living be proved on a balance of probabilities against her ability to earn as at that time of the accident not for future income.

22. Lord Denning MR in **Failley vs John Thompson Ltd. [1973] 2 Lloyd’s Rep 40 at page 41 states:**

1. “it is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of future earning capacity. Compensation for loss of future earnings are awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

I recognize that there is no formula for assessing loss of earning capacity, bearing in mind that this is not compensation for lost future wages, but compensation for loss of ability to earn. I take into consideration the observations I have made about the appellant’s current status and her age (41 years) and hold that she was entitled to an award for loss of earning capacity, and to that extent, the trial court erred. The appellant is entitled I therefore set aside the order dismissing her the appellant and substitute it with an award of Kshs. 500,000/-

23. The other issue raised by the appellant is that the trial court erred in failing to award her costs for future treatment, hiring and maintenance of a house-help and the cost of maintenance of the wheel chair. The amended plaint does not indicate anywhere that the appellant had pleaded for this claim. This only became manifest when she testified together with her witness (PW2). Indeed it is not in dispute from the medical reports availed in court that she needs a help to assist her since she is confined in a wheelchair. However this is a special damage claim which has to be specifically pleaded and proved. The issue of future medical expenses was dealt with in the Court of Appeal in the case of **SIMON TAVETA V MERCY MUTITU NJERU** [2014] eKLR where the court cited the case of **Kenya Bus Services Ltd. - vs Gituma** [2004] EA 91. The Court stated:

“And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a person’s legal rights should be pleaded”.

24. It is unfortunate the appellant did not plead the cost of future treatment, hiring and maintenance of a house-help and the cost of maintenance of a wheelchair. The court could not have failed to award this since she had given evidence on this. The court is a court of record and it cannot award that which was not pleaded. Section 107 of the Evidence Act provides that;

(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

This claim by the appellant shall fail for the reason that it was not pleaded and the appellant has only raised it in the memorandum of appeal.

25. The appeal succeeds partly on:

- a) **General damages for pain and suffering which is substituted with a figure of Kshs 2,125,000/- loss of earning capacity.**
- b) **Damages for loss of earning capacity Kshs 500,000/-**

26. The issue of future treatment, hiring and maintenance of a house help and cost of maintenance of the wheel chair were never pleaded,

thus it fails.

27. The appellant is **awarded** $\frac{2}{3}$ **costs** of this appeal.

Delivered, Signed and dated this 21st day of February 2019 at Eldoret

H. A. OMONDI

JUDGE